# *IMPORTANT NOTICE*

## *NOT TO BE PUBLISHED OPINION*

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: DECEMBER 18, 2003
NOT TO BE PUBLISHED

# Supreme Court of Kentucky

FINAL

DATE 3-18-04 ELIA Grp. H, D.C.

2002-SC-0252-MR

ROBERT J. CECIL, JR. — APPELLANT

V.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
1994-CR-0066 & 1994-CR-0078

COMMONWEALTH OF KENTUCKY — APPELLEE

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

Appellant, Robert J. Cecil, Jr., was convicted of first-degree rape, first-degree sodomy, and kidnapping by a Bullitt County jury. The jury also found Appellant guilty of being a second-degree persistent felony offender. Appellant was sentenced to forty-two years' imprisonment. This appeal comes before us as a matter of right. Ky. Const. § 110(2)(b). Appellant assigns the following errors: (1) the trial court erred in admitting evidence of prior sexual offenses; (2) once the evidence of prior sexual offenses was admitted, the trial court failed to provide a limiting instruction to the jury; (3) the trial court erred by determining that the KRS 509.050 exceptions to kidnapping did not apply to Appellant; and (4) the trial court erred by refusing to admit evidence that the victim had a venereal disease at the time of the rape. We find no errors and affirm the conviction.

**Facts:**

Appellant became acquainted with the victim, C.M., on Memorial Day weekend in 1994. The two met by chance at Otter Creek Park and Appellant asked C.M. if she wanted to go on a motorcycle ride with him. Appellant picked C.M. up early the next morning to go for the ride. Under the pretext of needing another motorcycle helmet, Appellant took C.M. back to his trailer. Once inside the trailer, Appellant tried to kiss C.M. When she refused, Appellant locked the trailer doors and struck C.M. across the face. Appellant ordered C.M. to remove her clothes. C.M. removed her own shirt because she did not want it torn and Appellant removed the rest of C.M.'s clothes. Appellant then tied C.M. to the bed with rope and proceeded to rape her vaginally and forced her to perform fellatio. C.M. testified that Appellant did not ejaculate in her vagina, but he did ejaculate in her mouth. Appellant also attempted anal sex with C.M., but she was able to resist. C.M. testified that Appellant then threatened to kill her and kept saying that "people just disappear" or "people disappear."

After the rape, Appellant stopped at a liquor store and his sister's before taking C.M. to her sister's house. C.M.'s sister took her to the hospital and the attending physician notified the police. Appellant was indicted on August 10, 1994. A jury trial commenced in Bullitt County on June 26, 2001, but a mistrial was declared because the jury was unable to reach a verdict. A second jury trial began on December 13, 2001, and Appellant was found guilty on all counts of the indictment.

**KRE 404(b):**

Appellant argues that he was denied a fair trial because the trial court incorrectly admitted evidence of prior sexual offenses in violation of KRE 404(b). We disagree and find that the trial court properly admitted the evidence.

KRE 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence may be admissible if used "for some other purpose" than to portray a defendant's criminal predisposition. Evidence of prior bad acts may be used to prove "motive, opportunity, intent . . . ." The other purposes listed under KRE 404(b) are meant to be "illustrative rather than exhaustive." Colwell v. Commonwealth, Ky., 37 S.W.3d 721, 725 (2000). The Commonwealth offered the testimony of L.K., another victim of Appellant, to demonstrate Appellant's modus operandi.

The trial judge must take into account the factual similarity between the prior misconduct and the charged offense when determining the admissibility of modus operandi evidence. Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999). The factual similarity between the previous misconduct and the charged offense "must be so strikingly similar . . . as to create a reasonable probability that (1) the acts were committed by the same person, and/or (2) the acts were accompanied by the same mens rea." Id. Otherwise, the prior misconduct is evidence of a criminal disposition and is inadmissible. Id.

The facts surrounding the rapes of L.K. and C.M. were sufficiently similar to demonstrate Appellant's modus operandi. In both cases, Appellant used the pretext of a motorcycle ride in order to isolate his victims. After Appellant's sexual overtures were rejected, Appellant struck L.K. and C.M. on the head. Appellant ordered each victim to undress, but Appellant eventually removed all or part of their clothing. Appellant raped both victims multiple times and forced them to perform fellatio. Finally, Appellant threatened L.K. and C.M. by saying "people just disappear" or "people disappear."

Once the strikingly similar facts establish modus operandi, the evidence of previous misconduct is admissible unless its probative value is outweighed by the danger of undue prejudice. KRE 403. Appellant argues that the factual differences in the rapes of L.K. and C.M. diminish the probative value of L.K.'s testimony to the extent that the probative value is outweighed by undue prejudice. However, the balancing test between the probative value of such evidence and the danger of undue prejudice is well within the discretion of the trial judge. English, 993 S.W.2d at 945. The trial judge's determination will only be reversed for an abuse of discretion. Id. After reviewing the record, we find that there was no abuse of discretion.

Appellant also argues that L.K.'s testimony regarding the outcome of Appellant's 1988 Jefferson County trial was inadmissible because of Appellant's "Alford plea."

During the Commonwealth's direct examination of L.K., there was no mention of the 1988 trial at all. The Commonwealth sought to establish the modus operandi evidence by questioning L.K. about the circumstances surrounding the 1988 rape. Upon cross-examination, defense counsel asked L.K. if there was a trial and what the outcome was. Defense counsel used this line of questioning to show the jury that Appellant was not convicted in that trial and that the jury was hung. On redirect examination, the Commonwealth asked L.K. if she knew the final outcome of the trial. L.K. stated that Appellant "plea bargained." Appellant then objected and the Commonwealth withdrew the question. Appellant did not request an admonition to the jury.

In the absence of a ruling on the objection or any further action by Appellant, there is no trial court "error" to review. "[A] party must make a proper objection to the trial court and request a ruling on that objection, or the issue is waived."

Commonwealth v. Pace, Ky., 82 S.W.3d 894, 895 (2002). Upon consideration of the case as a whole, we are unconvinced that L.K.'s comment resulted in manifest injustice.

**Jury Instructions:**

Appellant next argues that the trial court erred by neglecting, upon its own motion, to admonish or limit the jury regarding its consideration of L.K.'s testimony. While conceding that this alleged "error" is unpreserved for appellate review, Appellant contends that he is entitled to relief under the palpable error rule. RCr 10.26. Under RCr 10.26, a palpable error which affects the substantial rights of a party may be reviewed even if not preserved if it is determined that a manifest injustice has occurred. Cash v. Commonwealth, Ky., 892 S.W.2d 292, 295 (1995). There is no merit to Appellant's request for relief under RCr 10.26.

Appellant cites language from Bell v. Commonwealth, Ky., 875 S.W.2d 882 (1994), regarding a trial court's obligation to consider whether a limiting instruction in a KRE 404(b) case is likely to be effective. "[A] trial judge must consider whether a clear instruction limiting the jury's use to its proper purpose is likely to be effective." Id. at 890 (emphasis in original). Appellant argues palpable error on the sole basis that because no limiting instruction was given, there was no consideration by the trial court. This is not necessarily so, given the lengthy pretrial discussions regarding the challenged KRE 404(b) evidence.

We find no error in the trial court's decision not to give the jury a limiting instruction upon its own motion.

**KRS 509.050 Kidnapping Exceptions:**

Appellant next argues that he was entitled to a jury instruction regarding the KRS 509.050 kidnapping exceptions. Again, this issue is unpreserved for appellate review, and again it is without merit.

KRS 509.050 provides in pertinent part that:

> A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of the offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose.

Application of the kidnapping exception is determined on a case-by-case basis using a three-prong inquiry. Smith v. Commonwealth, Ky., 610 S.W.2d 602, 604 (1980). First, the criminal purpose must be defined outside KRS Chapter 509. Id. Secondly, the interference with the victim's liberty must occur immediately with and incidental to the commission of the underlying offense. Id. Finally, the interference with the victim's liberty must not exceed that which is normally incidental to the commission of the underlying offense. Id.

Appellant satisfies the first prong of the inquiry because rape and sodomy are defined outside KRS 509. As to the second prong, Appellant kept C.M. bound in his trailer for a duration of several hours. This period of captivity included long stretches of time when Appellant was not even present at the trailer. We find that C.M.'s confinement did not occur immediately with or incidental to the commission of the rape. "[T]he restraint will have to be close in distance and brief in time in order for the exemption to apply." Timmons v. Commonwealth, Ky., 555 S.W.2d 234, 241 (1977).

We need not reach the third prong because Appellant "must jump through three hoops and the failure to jump through any one of the three hoops is a failure to establish his entitlement to the benefit of the exemption statute. Griffin v. Commonwealth, Ky., 576 S.W.2d 514, 516 (1978). Accordingly, Appellant was not entitled to the KRS 509.050 kidnapping exception.

**KRE 412 and Evidence of C.M.'s Venereal Disease:**

Finally, Appellant argues that the trial court erred by refusing to admit evidence that C.M. had a venereal disease at the time of the rape. In addition to the evidence of C.M.'s medical condition, Appellant baldly asserts that if he had, in fact, raped C.M., then the probability of contracting the same disease would be almost certain. Appellant also asserts that evidence of C.M.'s venereal disease is exculpatory on its face because Appellant has not had or been treated for the same disease. Both of these assertions are devoid of evidentiary support in the record.

Prior to trial, the Commonwealth filed a motion to preclude the defense from admitting evidence concerning C.M.'s venereal disease or its treatment. The Commonwealth argued that this sort of evidence was irrelevant and inadmissible under KRE 412 as an attack on the victim's character and reputation. The trial court granted the Commonwealth's motion to exclude the evidence.

KRE 412 provides in pertinent part:

> (a) Reputation or opinion. Notwithstanding any other provision of law . . . reputation or opinion evidence related to the sexual behavior of an alleged victim is not admissible.
>
> (b) Particular acts and other evidence. Notwithstanding any other provision of law . . . evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless . . .

> (1) Evidence of past sexual behavior with persons other than the accused . . . upon the issue of whether the accused was or was not . . . the source of semen or injury;
>
> (2) Evidence of past sexual behavior with the accused . . . upon the issue of whether the alleged victim consented . . . ; or
>
> (3) Any other evidence directly pertaining to the offense charged.

KRE 412 tends to exclude evidence regarding the past sexual behavior of alleged rape victims. Lawson, The Kentucky Evidence Law Handbook, § 2.30, p. 109 (3d ed. Michie 1993). Evidence of an alleged victim's past sexual behavior must fit into the narrow exceptions of KRE 412 to be admissible. Id. If such evidence does satisfy an exception, then the trial judge must determine that the probative value outweighs the undue prejudice. Id. at 114.

Even assuming that the proffered evidence falls within the KRE 412 residual exception, we hold that the trial court did not abuse its discretion in excluding the evidence on relevancy grounds. See State v. Knox, 536 N.W.2d 735 (Iowa 1995); State v. Jarry, 641 A.2d 364 (Vt. 1994).

**Conclusion:**

The Appellee's motion to strike Exhibits A, B and C from the appendix of the Appellant's brief is denied as moot.

Accordingly, the judgment of the Bullitt Circuit Court is affirmed.

Cooper, Graves, Johnstone, Keller, Stumbo, and Wintersheimer, JJ., concur.

Lambert, C.J., dissents without opinion.

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